

# **TRANSPORTATION REPORT**

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## **A Victory For Arizona Electric Power In Rate Case Against UP and BNSF - Unreasonably High Rail Freight Rates**

The case, brought in 2008, was decided November 16th and issued November 22nd. AEPCO was being charged in excess of 180% R/VC by UP and BN. Note: The jurisdictional threshold for challenges before the STB are tariff rates that are in excess of 180% of variable cost.

The full Stand Alone Cost (SAC) analysis which is a rather complicated methodology for determining what competitive rail freight rates would be if a rail customer had competition presented to the STB by AEPCO showed that the SAC rate calculations resulted in reasonable rates below 180% R/VC, the jurisdictional threshold. However, since the STB has no jurisdiction to provide rate relief to lower than 180%, the rate was set at 180% for ten years from the date the case was filed. The reasonable rate determined by the STB will result in approximately \$4.5 million in reparations and a 27% rate decrease for 2009 and an average annual rate decrease of approximately 37% per year for the ten year life of the proscribed rate.

It is interesting to note that a second rail customer of BN now has a rate expressed as a R/VC ratio - Western Fuels and its partner including Basin Electric

being the first - so that AEPCO could realize less rate relief if BN is allowed to inflate its asset base with \$8 billion of the acquisition premium paid by Berkshire Hathaway for BN. This 'premiums' case is currently being processed before the STB at this time.

Editor's Note: Kudos to the AEPCO Board for supporting this case before the STB. These SAC cases are not inexpensive. Western Fuels and Basin Electric spent multi-millions of dollars on their victory over the BNSF. PPL in the last decade also spent millions on their case against the BNSF. It is interesting to note that the Uniform Rail Costing System (URCS) is re-emerging at the standard relied upon by the Board to determine the reasonableness standard in these cases.

## **UPDATE ON RAIL FREIGHT FUEL SURCHARGE ANTI-TRUST CASE AGAINST THE BIG FOUR**

From a monetary perspective, the fuel surcharge lawsuit is a larger risk to the railroads than all other legislative, regulatory, and legal issues combined. The next events prior to the potential trial will occur in the coming weeks. The damages sought could be as high as \$40 billion against the four Class One Rails. A settlement prior to the trial date (likely in the second quarter of 2012) at the Federal Courthouse in Washington D.C., is the most likely result, though the final number could still be in the billions.

The lawsuit, *Re: Rail Freight Surcharge Antitrust Litigation*, asserts that the defendant railroads (BNSF – owned by **Berkshire Hathaway, Union Pacific, CSX, and Norfolk Southern**) colluded through the Association of American Railroads (AAR) to escalate fuel surcharges for their contract shippers in lock step. The damages sought could be as high as \$40 billion.

U.S. District Court Judge Paul L. Friedman is expected to rule on class certification any Friday afternoon in the coming weeks, which would cover all contract shippers who moved freight between July 1, 2003 and December 31, 2008 (unless they have been excluded for some specific reason). **It is widely believed Friedman will rule for class certification, which will place a legal overhang on the rails until the matter is resolved.**

Following Judge Friedman's ruling on class certification, a trial date would be set following a final procedural step of the question of partial summary judgment that could take anywhere from two to six months. The trial would likely commence at the Federal Courthouse in Washington in the second quarter 2012, though the case could very likely be settled prior to the trial.

The surcharges were based off an AAR index called the All Inclusive Index Less Fuel (AII LF). The American Chemistry Council (ACC) has concluded that the overcharge on fuel alone totals at least \$6.5 billion across the industry from 2003-07, when the AII LF was in effect. In the federal circuit, courts can assess treble (triple) damages. The \$40 billion figure is reached in part by extrapolating these projections to include 2008.

The lawsuit has been pending in U.S. District Court of the District of Columbia since November 6, 2007 when 18 separate class action lawsuits were consolidated into *Re: Rail Freight Surcharge Antitrust Litigation*. Oral arguments were heard on class certification in early October 2010.

Editor's Note: The Big 4 railroads who control over 93% of the rail freight traffic in this country continue to state in their financial filings on Wall Street that one of the reasons their income is at record levels each quarter is because of the fuel surcharges they are assessing. The fuel surcharge is not supposed to be a 'money' maker or profit center but rather a mechanism to recover just the fuel

costs a railroad incurs over and above its base fuels. Many analyst suggest that the railroads are collecting (which is based upon Highway Fuel Cost Indexes) far more revenue than just the increases in fuel costs - indeed many collect more than their entire fuel costs. This case should be of interest to anyone who moved rail freight under a rail contract between July 1, 2003 and December 31, 2008.